

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

INDUSTRIAL MAINTENANCE and
CONSTRUCTION, INC.

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 87-179

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This case involves Industrial Maintenance and Construction, Inc.'s ("Industrial") appeal of Puget Sound Air Pollution Control Agency's issuance of Notice and Order of Civil Penalty (No. 6708; \$1,000) for alleged violations of asbestos handling regulations.

A formal hearing was held on September 9, 1988 in Seattle, Washington. Board Members present were Judith A. Bendor (Presiding) and Wick Dufford (Chairman). Appellant Industrial was represented by Lawrence J. Fulton, Asbestos Project Manager. Respondent PSAPCA was represented by Attorney Keith D. McGoffin of McGoffin and McGoffin.

1 Court Reporter Pamela J. Brophy of Gene Barker & Associates recorded
2 the proceedings. Sworn testimony was heard. Exhibits were admitted
3 and examined. Argument was made. From the foregoing, the Board makes
4 these

5 FINDINGS OF FACT

6 I

7 The Puget Sound Air Pollution Control Agency ("PSAPCA") is an
8 activated air pollution control authority under the terms of the State
9 of Washington Clean Air Act, responsible for monitoring and enforcing
10 emission standards for hazardous air pollutants, including work
11 practices for asbestos. PSAPCA has filed with the Board certified
12 copies of its Regulation I (including all amendments thereto).

13 The Board takes official notice of the Regulation (as amended). -

14 II

15 Industrial is a company located in Mt. Vernon, Washington which
16 does asbestos removal work. It was hired to remove asbestos from the
17 Jehovah's Witness Church in Stanwood, Washington, Snohomish County.
18 This was Industrial's first asbestos removal project in a place within
19 PSAPCA's jurisdiction.

20 III

21 The PSAPCA Notice and Order of Civil Penalty alleges that
22 Industrial violated WAC 173-400-075 and Regulation I on or about
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(2)

February 5, 1987, by:

1. Failure to contain removed or stripped asbestos in a controlled area at all times until transported for disposal. Section 10.04(b)(2)(iii)(c).
2. Failure to treat all asbestos-containing waste material with water, and after wet, seal in leak-tight containers, while wet. Section 10.05(b)(1)(iv).

A \$1,000 fine was assessed.

IV

Asbestos is a substance which has been specifically recognized for its hazardous properties. It is classified pursuant to Section 112 of the Federal Clean Air Act for the application of National Emission Standards for Hazardous air pollutants (NESHAPS). It is a substance which by Federal Clean Air Act definition:

causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness. Section 112.

Central Industries, Inc. v. PSAPCA, PCHB No. 87-88 (August 30, 1988), citing Savage Enterprises, Inc. v. PSAPCA, PCHB No. 87-164 (March 28, 1988) and Kemp Enterprises, et al. v. PSAPCA, PCHB No. 86-163 (February 18, 1987).

V

The federal asbestos handling regulations have been adopted by the Washington State Department of Ecology. WAC 173-400-075(1).

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1 PSAPCA has adopted its own regulations on removal of asbestos; they
2 are designed to meet or exceed the requirements of the federal and
3 state regulations. PSAPCA Regulation I, Article 10.

4 VI

5 In the fall of 1986, the Jehovah's Witness Church, located at
6 27127-56th Avenue NW, in Stanwood, Washington, burned and suffered
7 extensive damage. Industrial was hired to remove asbestos from the
8 damaged building, including that found in the ceiling and the roofing
9 felt. On behalf of Industrial, Lawrence J. Fulton filed with PSAPCA a
10 Notice of Intent to Remove asbestos from the 4,000 square foot
11 building. Mr. Fulton is a certified asbestos worker licensed in the
12 State of Washington and was in charge of the project.

13 VII

14 The removal began on Monday, February 2, 1987. There was debris
15 from the fire on the ground. Industrial began by removing the larger
16 asbestos pieces first. Then Industrial cleaned up the north side of
17 the church where the roof and eaves had fallen in. Shakes and
18 shingles were removed from the roof. The felt, which was made of
19 asbestos, was removed from the roof and sealed while wet in double
20 bags. Asbestos-containing bags were left overnight (February 4 to
21 February 5, 1987) on the church roof and on the ground outside.

22 A yellow asbestos warning tape was strung around the church and
23 all bags were behind this tape. On February 5, 1988, however, the
24

1 tape was in places lying on the ground, and in other places debris was
2 on top of the tape. There were asbestos warning signs posted in
3 several locations. A driveway right next to the church was used by
4 church members during the removal to access a pump house.

5 Industrial's efforts to clean up the south side of the church,
6 including removing the shakes and shingles and some of the felt from
7 the roof, was in progress on February 5, 1988. On that day the area
8 was very wet, there having been heavy rains.

9 VIII

10 At approximately 11:30 a.m. on February 5, 1987, an inspector
11 with PSAPCA arrived at the church. He observed the bags
12 containing asbestos on the church roof and on the ground. He took
13 several photographs. He took a sample from material from the bases of
14 chairs that were outside. A subsequent test demonstrated that this
15 material was not asbestos.

16 He also took a sample from an approximately 7" by 8" piece of
17 roofing felt found among burnt debris on the south side of the
18 building. The felt was very wet at the time. Subsequent tests
19 revealed the material to be asbestos, 70% chrysotile.

20 IX

21 Based on the inspection and tests, Notices of Violation (Nos.
22 021513 and 021514) were issued, and the Notice and Order of Civil
23 Penalty (No. 6708) was issued on June 22, 1987.

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26 FINAL FINDINGS OF FACT,
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1 Industrial filed its appeal in a timely manner. (Board Order
2 Denying Motion to Dismiss, August 11, 1987; confirmed on other grounds
3 by Superior Court for Thurston County, Cause No. 87-2-01691-6, April
4 19, 1988.)

5 X

6 On February 5, 1987, after being informed of the possible
7 violations, Industrial had the asbestos bags placed inside the
8 building, and the bags were disposed of the next day at an authorized
9 dumpsite.

10 XI

11 Under all the facts and circumstances, we are not persuaded that
12 the existence of the asbestos felt in the time and place found on
13 February 5, 1987, is attributable to any act of Industrial. Moreover,
14 Industrial was still in the process of removing asbestos. The
15 asbestos felt piece taken as a sample was wet at the time. Therefore,
16 under all the facts and circumstances we are not persuaded that
17 Industrial had engaged in any cognizable omission as regards the
18 wetting and bagging of asbestos.

19 XII

20 Any Conclusion of Law deemed to be a Finding of Fact is hereby
21 adopted as such. From these Findings of Fact, the Board makes these

22 CONCLUSIONS OF LAW

23 I

24 The Board has jurisdiction over the subject matter and the

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26 FINAL FINDINGS OF FACT,
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1 parties. Chapter 43.218 RCW. The case arises under PSAPCA Regulation
2 I, Section 10, implementing the Washington Clean Air Act, Chapter
3 70.94 RCW.

4 PSAPCA has the burden of proof.

5 II

6 Regulation I, Section 10 provides for liability on a strict
7 basis; negligence need not be found. This strict liability standard
8 supports the goal of preventing harm, because asbestos is a hazardous
9 material which may reasonably be anticipated to cause serious
10 irreversible illness. (See Finding of Fact IV, infra.)

11 Any diligence undertaken by appellant is weighed against the
12 amount of the fine, rather than negating basic liability.

13 III

14 We conclude that PSAPCA has not proven Industrial violated
15 Regulation I, Section 10.05(b)(1)(iv). (See Finding of Fact XI above.)

16 IV

17 We conclude that Regulation I, Section 10.040(b)(2)(iii)(c) was
18 violated when the asbestos-containing bags were left overnight
19 outside. "Controlled area" is defined as "an area to which only
20 certified asbestos workers or other authorized personnel have
21 access." Section 10.02(j). Here access was by simply walking or
22 driving to the church where the bags were outside. The bags were not
23 in a "controlled area".

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26 FINAL FINDINGS OF FACT,
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V

The purpose of civil penalties is to promote future compliance with the law, both by these parties and the public at large. Central Industries, supra. The reasonableness of penalties is based upon several factors, including the scope of the violation and appellant's conduct.

We conclude that Industrial's lack of prior violations of PSAPCA regulations and its subsequent efforts to contain the asbestos bags in a controlled area merit reduction of the penalty.

VI

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

ORDER


The Notice and Order of Civil Penalty as to the violations of Regulation I, Section 10.05(b)(1)(iv) is REVERSED, and as to Section 10.04(b)(2)(iii)(c) is AFFIRMED.

The \$1,000 penalty is REDUCED to \$750. In addition, \$400 of the remaining penalty is SUSPENDED on condition that Industrial does not violate air pollution laws for two years from the date of this Order.

DONE this 13th day of October, 1988.

POLLUTION CONTROL HEARINGS BOARD


JUDITH A. BENDOR, Presiding


WICK DUFFORD, Chairman